STATE OF MICHIGAN

COURT OF APPEALS

In re FRANCES WILLIAMS MESSER TRUST, DATED JANUARY 10, 1939.

FIFTH THIRD BANK, formerly known as, OLD KENT BANK & TRUST, Trustee,

Petitioner-Appellee,

v

REMAINDER BENEFICIARIES,

Respondents-Appellees.

UNPUBLISHED
March 22, 2005

No. 249456
Kent Probate Court
LC No. 92-153441-TV

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Respondents, the remainder beneficiaries of the Frances Williams Messer Trust, dated January 10, 1939, appeal as of right from an order allowing petitioner trustee's accounting for the period January 1, 1980 through December 31, 1991. We affirm.

I. Facts and Procedural History

The facts and procedural history of this case are reported at *In re Messer Trust*, 457 Mich 371, 373-376; 579 NW2d 73 (1998), and *In re Estate of Frances Williams Messer Trust, dated January 10, 1939*, unpublished opinion per curiam of the Court of Appeals, issued May 29, 2001 (Docket No. 220177). After this Court issued its May 29, 2001 opinion and order remanding to the probate court, the trustee filed a motion for summary disposition, again arguing "that there need be no jury trial, and indeed no further trial at all, because the issues which the Court of Appeals has identified in its opinion are either clearly embraced within the concept of 'prudence' or are issues purely of law and not of fact." The remainder beneficiaries responded, claiming that jury trial was appropriate to determine (1) whether the trustee violated its duty of loyalty by having a banking relationship with the Tyden company; (2) whether the trustee lacked diligence and good faith in failing to receive an adequate price for the Tyden stock; and (3) whether the trustee breached its duty to inform and account to the remainder beneficiaries. The remainder beneficiaries also filed a motion for partial summary disposition, arguing the trustee is in breach of trust for failing to inform the remainder beneficiaries of the trust or the sale of trust assets as required by former MCL 700.814.

After a hearing, the probate court denied the remainder beneficiaries' motion, and granted the trustee's motion. In regard to remainder beneficiaries' motion, the probate court, in its adopted findings of fact and conclusions of law, held that "[t]he legal issue, whether the remainder beneficiaries were entitled to accountings from the trustee, boils down to a question whether [*In re Childress Trust*, 194 Mich App 319; 486 NW2d 481 (1992)] should be applied retroactively and operate to overrule the provisions of the Messer Trust Agreement." The probate court concluded that *In re Childress Trust*, was not retroactive, and consequently that the trustee was not required, pursuant to former MCL 700.814, to notify and advise the remainder beneficiaries of the sales of Tyden stock. In regard to the trustee's motion, the probate court, in an oral opinion from the bench, held:

> So I have been listening to the arguments and reading the submissions regarding whether there are other factors for this Court to consider—factual matters that are outside the province of prudence. And the regular dictionary, which I didn't drag in with me, the non-legal dictionary, talks about prudence being the broadest umbrella under which, some of these other subcategories would fall under that umbrella.
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> The question that the Court of Appeals has asked this Court to determine is whether construction of facts and assessment of credibility are factors which would create separate fact issues for a jury to decide. And, again, they did not have the full record on appeal. So they didn't know exactly what Judge DeYoung considered, apparently, but they will have, I suspect, the next time.
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> But it is my inescapable conclusion that under that umbrella, that broad umbrella of prudence, the Court has already examined and made determination that the factors raised by the—by the beneficiaries, the objecting beneficiaries, fall under that umbrella in that they question the integrity or wisdom or business sagacity of the trustees in taking a less than full book value for the stock that was involved. They wonder whether or not disloyalty was exhibited because the—the bank also had some sort of business relationship with the purchaser of the stock. And I think that something that Mr. Clark said is quite accurate. That if somebody was prudent in this matter, it virtually excludes the notion that they could be careless or sloppy or indifferent to the business reality of selling for a lesser price. That their diligence in examining the risks to this stock account constitute a part of their prudent conduct. And as part of their examination of whether or not they were making a prudent choice to divest this stock, that the adequacy of price was part of that decision.
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> As to whether or not they betrayed their fiduciary duty to give notice to beneficiaries, I do believe that the language of the actual trust document does control. And that they were not—not only were they not required to under the language of the document, but I would read this language as saying that the original grantor was not wanting additional beneficiaries to know. And I suppose until you have children that are eyeing your portfolio, you might not understand that as much. And I concur with Mr. Power's speculation. But, clearly, this grantor eliminated others from knowing as—as long as John Messer was alive—and as long as the settlor was alive, she didn't want any—her son necessarily

knowing about her affairs either. It was a strict succession of people that were entitled to know. And I do believe that the document language controls the trustee's, not only the obligation to release information, but their ability to release it.

* * *

I believe that under all of the circumstances, there are not outstanding issues to be determined by a jury. I believe that all of the complaints lodged by the beneficiaries have to do with whether the trustee acted in a prudent fashion. And that all of those subcategories of objections fall under that wide umbrella of prudence on the part of the trustees, whether it was the decision to—and as Mr. Clark has noted, and as I recall from out prior days here, if this stock in the company had become worthless, and we all know that this can happen from recent events and economic and business history in our country, certain things that we think are glowing investment and a fine plan can become worthless. And had that happened and the trustee had divested the stock, they would have been considered brilliant. Because the value, which went up, which is something that no matter how prudent or careful or cautious you are, there is no crystal ball to make that determination. I do think that all of those decisions fall under the broad umbrella of prudence, which was properly decided by the trial court before; and that, therefore, there are no outstanding factual issues for determination by a jury.

Accordingly, it is appropriate to grant summary disposition to—to the trustee petitioner and to, therefore, deny the motion for partial summary disposition filed by the remainder beneficiaries.

Thus, the probate court rejected the remainder beneficiaries' objections to the trustee's final accounting, and allowed the trustee's final account for the period January 1, 1980 through December 31, 1991. However, the probate court did not discharge the trustee, and reserved jurisdiction over further proceedings with the trust. This appeal followed.

II. Trustee's Prudence

The remainder beneficiaries first argue that the probate court erred in deciding that the trustee acted with reasonable prudence regarding the sales of Tyden stock.

A. Standard of Review

In *In re Messer Trust*, our Supreme Court expressed agreement with other jurisdictions "holding that the prudent person test is a mixed question of law and fact; what the trustee did or did not do is a question of fact; and what a reasonable trustee would have done is a legal question . . ." *In re Messer Trust*, 457 Mich at 371. Thus, appellate courts review for clear error a probate court's factual determination regarding the actions of a trustee; however, the ultimate decision concerning whether those actions were prudent is a question of law reviewed de novo. "A finding is clearly erroneous when, although there is evidence to support it, upon reviewing the entire record, the appellate court is left with a definite and firm conviction that a mistake was

made." *Westlake Transp, Inc v Public Service Comm*, 255 Mich App 589, 611; 662 NW2d 784 (2003).

B. Analysis

In its opinion dated December 1, 1993, the probate court[1] held in regard to the trustee's prudence, that:

> The major claim of the remainder beneficiaries is that [the trustee] did not market or shop the stock nor did they try to ascertain its value. They further claim the [the trustee] owed them a duty to at least seek them out to see whether of not they would be willing to buy the stock.
>
> Expert witnesses were called by both sides. The two primary expert witnesses being Richard W. Heiss on behalf of the remainder beneficiaries and Joseph McElroy on behalf of the [trustee]. Both have excellent credentials, and are in fact good friends of one another. Mr. Heiss states basically that he feels that [the trustee] did not act prudently and should be liable for not shopping the stock nor seeking the approval of the beneficiaries, and feels the trustees should have shopped the stock. He further feels that they should have talked to the beneficiaries and that if the beneficiaries had not agreed to buy the stock they then should have petitioned the probate court for instruction. However it is interesting that he did testify that although [the trustee's] conduct towards the beneficiaries didn't rise to a standard of care he would want, he could not say that that was a total breach of fiduciary responsibility.
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> There was considerable testimony regarding the selling of the stock back to the [company] at the price set by the company, and also about whether or not appraisals should have been sought. Unlike real estate, which was the asset in the *Green* case and able to be appraised, there was no market for the [Tyden] stock and the only sales ever made were to the company at a price set by the company. An exhibit identified as the "pink sheets" shows no market during the entire period of the 80's. Thus, the Court finds that it would not have been feasible or economically realistic to have sought an appraisal of such a small minority interest that the [trustee] held of [Tyden] shares.
>
> The Court feels that the only duty owed to the remainder beneficiaries by [the trustee] was to exert a standard of care expected of a trustee of a reasonably prudent man dealing with the property of another and that they exercised that standard of care. The Court would agree that perhaps it would have been nice of the [trustee] to have consulted the beneficiaries who stated they would have been willing to buy, but it does not feel that there was any legal obligation to do so.

[1] Notably, the probate court judge that the issued this opinion had retired while this case was on appeal to the Michigan Supreme Court.

* * *

> It is the opinion of the Court that all the sales were made of the [Tyden] stock were due to the undue concentration of the [Tyden] stock in relation to the total volume of the trust, and the main reason for all sales was for diversification and do not indicate bad faith. There was also additional testimony from various witnesses that [the trustee] also sold [Tyden] stock from two other trusts of which it was the trustee. The sales and amount received and dates of sales were the same for all three trusts.

* * *

> The remainder beneficiaries' objections to the trust are disallowed. The Trustee's decisions to sell the [Tyden] stock in 1981, 1982, 1984, 1989 as above described are deemed reasonable and consistent with the Trustee's fiduciary duties. . . .

We conclude that the probate court's findings are not clearly erroneous and that the probate court did not err in deciding that the trustee was reasonably prudent regarding the sales of Tyden stock. Former MCL 700.813 provided that:

> Except as otherwise provided by the terms of the trust,[2] the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special

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[2] The remainder beneficiaries argue that the probate court improperly concluded that the trust agreement precludes the trustee's liability in this case. The terms of the trust provide that:

> The trustees shall be held to no obligation whatever under the terms of this agreement, save to the exercise of good faith and ordinary diligence in the discharge of those duties or burdens which by the terms of this instrument they have expressly undertaken.

Before addressing the issue of prudence, the probate court, in its opinion, stated:

> Thus, since no accusation of bad faith has been levelled [sic] at the trustee, it would appear from the face of the governing instrument that, after Lambie's and Anderson's deaths, neither an Old Kent decision to sell the [Tyden] stock nor the price which it agreed to accept at the time, can be faulted. . . .

While the probate court's opinion suggests that the trustee may not be liable under the terms of the trust, the probate court primarily resolved the issue of the trustee's liability by deciding whether the trustee was prudent. A decision that reaches the correct result will be affirmed on appeal. *Morosini v Citizens Ins Co of America*, 224 Mich App 70, 86; 568 NW2d 346 (1997). Thus, even if the probate court had incorrectly determined that the terms of the trust relieved the trustee of liability, this Court may nonetheless affirm on the basis that the probate court correctly determined that the trustee was prudent.

> skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

Although former MCL 700.813 does not expressly impose a duty on the trustee to diversify trust assets, authorities recognize that diversification of risk is fundamental to prudent investment. Indeed, the Restatement on Trusts, 3d (Prudent Investor Rule) (1990), § 227(b), p 8, provides that, "[i]n making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so." Further:

> The trustee should exercise prudence in diversifying investments so as to minimize the risk of large losses. He should not therefore invest more than a reasonable proportion of the trust estate in a single security, or, it would seem in a single type of security. This is commonplace among experts in the art of making investments [3 Scott, Trusts, 3d (1967) § 228, p 1855.]

Where a "question arises as to the retention of investments received by the trustee from the creator of the trust as part of the trust estate," it is recognized that, "[i]n such a case, the trustee may be under a duty to dispose of a part of the investments, even though they are otherwise proper trust investments, in order to bring about a diversification." 3 Scott, Trusts, 3d, § 230.3, p 1875. However, the trustee must be prudent in disposing of the trust asset, even if to bring about diversification. See *In re Ansell Family Trust*, 224 Mich App 745, 749; 569 NW2d 914 (1997); *In re Green Charitable Trust*, 172 Mich App 298; 431 NW2d 492 (1988).

The probate court's finding that "all the sales were made of the [Tyden] stock were due to the undue concentration of the [Tyden] stock in relation to the total volume of the trust," is not clearly erroneous. Here, there was extensive evidence presented indicating that the Tyden stock was overly concentrated, representing at least forty-four percent of the trust assets.

The probate court's finding that a valuation of Tyden stock would not have been feasible or economically realistic, is not clearly erroneous. There was testimony that valuations of closely-held company stock are costly. Specifically, that the first valuation of Tyden stock in 1981 would have cost $10,000 to $12,000, then two later required valuations each would each have cost $5,000 to $6,000. Moreover, even assuming a favorable valuation, there was evidence that the trustee would still have had to negotiate with the company. Apparently, this can prove difficult, as Fred Gaul, the trust administrator, testified that "its very difficult to change the minds of people that own the business and that control the business. They don't have to sell [sic]. They can freeze me out. They can not pay dividends. They can accumulate hoards of cash. They can create retirement programs entirely for their benefit. And [the trustee] has no say in the matter . . ." Here, where the trustee held only a small percentage of minority stock in a closely-held company, the probate court's finding that an outside valuation was not required is not clearly erroneous.

The probate court's finding that there was "no market for the [Tyden] stock and the only sales ever made were to the company at a price set by the company," is not clearly erroneous. The record reflects that Tyden stock had only previously been purchased by the Tyden company and by Tyden employees, who purchased Tyden stock either directly from the Tyden company or apparently from other employees of the Tyden company in arms-length transactions. Thus, the only purchases of Tyden stock in which Tyden company was not a party had been between

employees of the Tyden company. However, John Panfil's testimony indicates that the employees purchased Tyden stock at the prices set by the Tyden company. This is consistent with McElroy's conclusion that, "[t]here was one market for the stock and that was provided by the company, period." Absent evidence establishing that employees of Tyden would have paid more than the Tyden company, the probate court's finding is not clearly erroneous. Moreover, there is no evidence indicating that Tyden employees could purchase the large number of shares the trustee determined was necessary to sell to diversify the trust.

The remainder beneficiaries maintain that officers and employees of the Tyden company and the remainder beneficiaries are themselves a market and would have paid more for the stock. This contention is without merit. At best, the remainder beneficiaries have described a potential market, not a market existing when the stock was sold. Therefore, the probate court's finding that there was "no market for the [Tyden] stock" is not clearly erroneous.

The probate court's finding that the trustee obtained reasonable prices for Tyden stock, is not clearly erroneous The trustee presented testimony from Harry Able, an expert in the valuation of closely-held companies, that the price obtained for Tyden stock at each sale was reasonable. Able testified that:

> . . . 84.3 percent of the total redemptions were from other than Old Kent as trustee. The prices were in most instances exactly the same when they were in the same year as the Messer trust. In a couple years there was slight differences where the Messer trust was higher in some and lower in others. The best of a willing buyer/seller is best met by actual transaction in the open market. I consider that a strong indication of fair market value of the stock. And the prices are between my low which I computed and Mr. Dalrymple's high numbers. So I consider them to be reasonable."

In addition, McElroy concluded that the trustee accepted reasonable prices for Tyden stock, given that "it was common for closely-held stock to be "traded at deep discounts from measures that would be applicable to public companies." Further, Gaul testified that "it is not uncommon to see 50 percent discounts from [book value.] Thus, the probate court's finding that the trustee obtained reasonable prices for Tyden stock, is not clearly erroneous

Though the remainder beneficiaries did present evidence that the fair market value of Tyden stock at each of the sale was higher than the prices obtained by the trustee, the probate court found that "the value placed on the stock by the expert for the remainder beneficiaries does not seem appropriate for this stock that was part of this matter as it only was a minority interest in a closely-held business." The accounting expert for the remainder beneficiaries, John Dalrymple, testified that the fair market value of Tyden stock was substantially higher than the price accepted by the trustee. However, the trustee's expert, Able, testified that Dalrymple's method of determining fair market was not appropriate. Specifically, Able testified that:

> In Mr. Dalrymple's report he says he is valuing the fair market value of 100 percent of the Class A common. So that since they have absolute control and can liquidate, this method could be proper for valuing all of the assets. In other words, the sale of 100 percent of the company.

> The transaction here is sales of 1/10th of 1 percent to 4/10ths of 1 percent. 5 transactions. Which total less that 1 and ½ percent in total. The method is not valuable for valuing a partial interest in a corporation.

"The reviewing court will defer to the probate court on matters of credibility, and will give broad deference to findings made by the lower court because of its unique vantage point regarding witnesses and other factors not readily available to the reviewing court." *In re Estate of Erikson*, 202 Mich App 329, 331; 508 NW2d 181 (1993); MCR 2.613(C). Here, the probate court was within its discretion to reject Dalrymple's testimony regarding fair market value on the basis of Able's critique of Dalrymple's method of valuation. Thus, the probate court's finding that Dalrymple too highly valued Tyden stock is supported by the record.

The remainder beneficiaries' remaining arguments regarding this issue are not persuasive. The remainder beneficiaries argue that the trustee's sale of Tyden stock was not prudent because it failed to consider capital gains taxes in selling Tyden stock. However, the record reflects that the trustee considered the tax consequences, and accordingly mitigated the tax burden by spreading the sales of Tyden stock over a ten-year period. The remainder beneficiaries also argue that the trustee did not consider that Tyden stock was "special." However, the terms of the trust clearly stated that the trustee had discretion to sell Tyden stock, notwithstanding the settlor's stated preference to retain it.

Last, the remainder beneficiaries claim *In re Green Charitable Trust*, *supra*, is controlling. We disagree. In *Green*, the trustee was surcharged for the sale of a trust asset at an inadequate price. However, the *Green* court reviewed a lower court's decision that the trustee was imprudent. Further, *Green* involved the valuation and marketing of a parcel of real property, not closely-held stock, to which "no established market value exists to assist the courts in valuing [it]." *Butterfield v Metal Flow Corp*, 185 Mich App 630, 641; 462 NW2d 815 (1990). Finally "the existence of bad faith was of paramount importance to the [*Green*] Court's decision." *In re Ansell Family Trust*, *supra* at 749. Indeed, because of the existence of bad faith, this Court imposed a "'stringent burden' on the trustee to show that the sale was fairly made for an adequate price," *Id*. Here, although the remainder beneficiaries allege bad faith, the allegations are substantially different from those in *Green*. In *Green*, the trustee, who was an attorney of the law firm who represented the seller and purchaser of the property, was involved in a "multiplicity of . . . roles [that] created a situation fraught with conflict . . . " *Id*. at 325. The trustee here did not act in several capacities in regard to the sale of Tyden stock. Therefore, *Green* does not control this case.

In summary, the probate court, over the seven-day bench trial, considered extensive evidence presented through numerous exhibits and testimony from over fifteen witnesses, many of whom were experts. Upon review of the entire record, we cannot conclude that the probate court erred in determining that the trustee was prudent. *Westlake Transp, Inc*, *supra*. The trust agreement expressly granted the trustee the power to sell the Tyden stock. The Tyden stock was an overly concentrated asset of the trust, and because of potential risks of holding overly concentrated minority stock in a closely-held corporation, the trustee decided to sell it. The trustee performed a reasonable limited valuation of the Tyden company, and also determined that the Tyden company was the only market that would purchase the stock. The trustee received reasonable prices for the Tyden stock, and based on the extensive record, we cannot conclude that the probate court erroneously decided the trustee acted prudently in selling the Tyden stock.

III. Trustee's Failure to Account to Remainder Beneficiaries

The remainder beneficiaries argue that "the trustee's failure to notify and advise the remainder beneficiaries of [sales of Tyden stock] constitutes a breach of trust.

A. Standard of Review

This issue was addressed in the context of the probate court's decision denying the remainder beneficiaries' partial motion for summary judgment. We review de novo the trial court's decision on a motion for summary disposition. *Franchino v Franchino*, 263 Mich App 172, 181; 687 NW2d 620 (2004). Summary disposition may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). In evaluating the motion, the trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Franchino, supra*.

B. Analysis

Former MCL 700.814, entitled, "Duty of trustee to keep beneficiaries informed; statements of accounts," provided in relevant part:

> (1) The trustee shall keep the presently vested beneficiaries of the trust reasonably informed of the trust and its administration.
>
> (2) Within 30 days after his acceptance of the trust, the trustee shall inform in writing the presently vested beneficiaries and if possible, 1 or more persons who may represent beneficiaries with future interests, of his name and address and of the court in which the trust is registered or probated, and, further, advise the beneficiary that he has the right to request and receive a copy of the terms of the trust which describe or affect his interest and relevant information about the assets and administration of the trust.
>
> (3) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration.
>
> (4) The trustee shall provide to each presently vested beneficiary a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

Here, the remainder beneficiaries have vested interests, subject to defeasance in the event their death before the expiration of John Messer's life estate or depletion of the trust. See *Stevens Mineral Co v Michigan*, 164 Mich App 692, 696, 418 NW2d 130 (1987). In *In re Childress Trust*, *supra* at 327, this Court determined that, under Michigan case law, a person with a "vested interest subject to defeasance" is referred to as having "present vested remainder." citing *Hogan v Hogan*, 102 Mich 641, 643; 61 NW 73 (1894); *Mandlebaum v McDonell*, 29

Mich 77, 87 (1874). Thus, *In re Childress* concluded that remainder beneficiaries, whose interests are vested subject to defeasance, are "presently vested remainders," entitled to performance of the trustee's duties pursuant to former MCL 700.814. *Id.* at 326-327. Moreover, "a trust provision relieving the trustee of the duty to keep formal accounts does not abrogate the statutory duty to account to the beneficiaries in the probate court." *Id*. at 328-329. Accordingly, the trustee failed to comply with former MCL 700.814.

The trustee's sole argument in this regard is that *In re Childress* is not retroactive, and therefore the remainder beneficiaries were not entitled to notice of the sale of Tyden stock (Appellee's brief on Appeal, 26-31). The determination whether a decision should be applied retroactively or prospectively presents a question of law subject to de novo review. *Adams v Dep't of Trans*, 253 Mich App 431, 435; 655 NW2d 625 (2002).

Generally, judicial decisions are given full retroactive effect. *Adams, supra*, citing *Pohutski v Allen Park*, 465 Mich 675, 696, 641 NW2d 219 (2002). "Prospective application of a holding is appropriate when the holding overrules settled precedent or decides an 'issue of first impression whose resolution was not clearly foreshadowed.'" *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997).

Here, *In re Childress* did not overrule precedent, but rather interpreted former MCL 700.814. Accordingly, the question presented is whether *In re Childress* interpreted former MCL 700.814 in a manner "not clearly foreshadowed." Although the Court in *In re Childress* did determine that the phrase, "presently vested beneficiaries," as used in former MCL 700.814, was ambiguous, the Court relied on existing precedent involving a similar phrase to clarify operation of the statute. Because this Court relied on existing precedent to resolve the ambiguity, it cannot be maintained that the result reached in *In Re Childress* was not clearly foreshadowed. Therefore, *In re Childress* is not limited to prospective application only and is therefore binding on the instant case.

The remainder beneficiaries assert that the trustee's failure to comply with former MCL 700.814 constitutes a breach of trust, requiring "a return of those [Tyden] shares to the trust." However, there is no indication that, absent a breach of trust, a trustee's failure to comply with former MCL 700.814 entitles the beneficiaries to damages. Rather, former MCL 700.814 merely requires as a remedy that the courts enforce its provisions. Moreover, the remainder beneficiaries failed to show that the trustee was in breach of trust in regard to compliance with former MCL 700.814. Indeed, when asked:

> Do you feel that in terms of the fiduciary's conduct toward the beneficiaries either in terms of communication, in terms of knowledge of the fiduciaries, their relationship to the stock, health, et. Cetera, that the conduct of the fiduciary rose to the level of care and as to whether or not it constituted a breach of fiduciary responsibility?

the remainder beneficiaries' expert, Heiss, responded:

> I would not meet the standard that I would set if I were operating the account. I don't think I can say that the degree of communication, the degree of knowledge acquired by the beneficiary, resulted in a breach of fiduciary

> responsibility. I just think it was not very good. But I won't go so far that it breached.

Thus, the remainder beneficiaries' expert in trust administration does not reach the conclusion that the failure to comply with former MCL 700.814 constitutes a breach of trust.

Moreover, the principle underlying the trustee's duty to account, i.e., "[t]he beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust," was not contravened in the instant case. *In re Childress*, *supra* at 328, citing 1 Restatement of Trusts, 2d, § 173, comment c, p 378. While the trustee's failure to comply with former MCL 700.814 may have prevented the remainder beneficiaries from initially challenging the trustee's prudence when Tyden stock sales were executed, the remainder beneficiaries were still able to challenge the trustee's prudence in regard to sales of Tyden stock. Thus, the trustee's failure to comply with former MCL 700.814 was remedied in accordance with the principle underlying the statute, and therefore, the probate court properly dismissed this claim.

IV. Remaining Questions of Fact

A. Standard of Review

> We review de novo the trial court's decision on a motion for summary disposition. To successfully oppose a motion under MCR 2.116(C)(10), the nonmoving party must set forth evidence of specific facts showing that a genuine factual issue exists. In evaluating the motion, the trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. If the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. [*Franchino*, *supra* at 181 (citations omitted).]

B. Analysis

The Supreme Court held that "the issue of the trustee's prudence is for the trial court . . . " and that "[a]ll other factual issues are properly submitted as jury questions." *In re Messer*, 457 Mich at 388. The Court remanded "the case to the Kent County Probate Court for a jury trial regarding any remaining factual issues." *Id*. This Court further elucidated the Supreme Court's holding, stating that the probate court was to determine whether "the allegations characterized as good faith and due diligence . . . fall outside the realm of prudence. Once that decision is reached, the trial court is required to provide remainder beneficiaries their right to a jury trial, regardless of the opinion of the prior conclusion and findings by the prior trial court, if there are genuine issues of material fact. *In re Estate of Frances Williams Messer Trust, dated January 10, 1939*, unpublished opinion per curiam of the Court of Appeals, issued May 29, 2001 (Docket No. 220177), slip op at 5.

On second remand, the probate court determined that there are no outstanding issues to be determined by a jury because the remainder beneficiaries' claims do not raise factual questions outside the realm of prudence.

1. Good Faith and Diligence

a. Adequacy of Price for Tyden Stock

The remainder beneficiaries first argue that there remains a jury question whether the trustee breached its duty of good faith and diligence by not obtaining an adequate price for Tyden stock. In *In re Messer Trust*, our Supreme Court held that "[t]he probate court, not the jury, is in the best position to make the determination whether a trustee has breached its duty under the prudent-person rule." 457 Mich at 387. Further, that "any determination with respect to a breach of that decision-making process is best handled by the probate court." *Id*. Here, the price obtained by the trustee for Tyden stock is inextricably linked to trustee's decision-making process when attempting to obtain diversification. Had the trustee received the "book value" of the stock, the remainder beneficiaries would not have claimed that the trustee was imprudent. Indeed, when asked "if they'd have gotten the premium price for the stock I don't suppose there would be a breach," the remainder beneficiaries' expert, Heiss, agreed that "I don't think we'd be here." Thus, the probate court properly decided that the adequacy of price for Tyden stock is not an issue outside the realm of prudence.

Moreover, the question whether the trustee had obtained an adequate price is implicated in every sale of a trust asset, and allowing a jury to determine this issue "would potentially subject a trustee to the whim of every impatient of unsatisfied beneficiary who is displeased with the trustee's business decision." *In re Messer Trust*, 457 Mich at 387, n 11. Therefore, the probate court properly granted the trustee's motion for summary disposition of this claim.

b. Retention of Trust Proceeds

The remainder beneficiaries argue that they were entitled to a jury trial on this issue of whether the trustee lacked good faith and diligence in retaining the trust proceeds without court authorization. The trustee withheld and eventually paid out $41,162.80 in attorneys' fees. To establish this claim, the remainder beneficiaries rely on *In re Thacker's Estate*, 137 Mich App 253; 358 NW2d 342 (1984). *In re Thacker's Estate* addressed the language of former MCL 700.541, which provided that, "[f]iduciary fees may be taken at intervals *as approved by the court*" (emphasis supplied). This Court held that under former MCL 700.541, the trustee was required to obtain court approval before distribution of trust funds. Here, however, the remainder beneficiaries have not shown that former MCL 700.541 is applicable to this case. Therefore, the remainder beneficiaries reliance on *In re Thacker's Estate* is misplaced, and dismissal of this claim is proper.

c. Failure to Follow Internal Procedures

The remainder beneficiaries argue that they were entitled to a jury trial on this issue of whether the trustee lacked good faith and diligence in failing to follow its own internal procedures relating to the diversification of trust assets. Initially, we note that because the remainder beneficiaries only give this issue cursory treatment with no citation of supporting authority, it may be deemed abandoned. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984); *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). Moreover, whether the trustee properly followed its own procedures only implicates the trustee's decision-making process regarding the sale of Tyden stock. Indeed, counsel for the remainder

beneficiaries throughout the bench trial presented evidence and argued that the trustee's failure to comply with its internal procedures was imprudent. Therefore, because the record reflects that this claim is not outside the realm of prudence, the probate court properly granted the trustee's motion in this regard.

2. Breach of Duty of Loyalty

a. Conflict of Interest

We conclude that the remainder beneficiaries failed to present evidence to establish a genuine issue of material fact to support their claims of lack of good faith and diligence. The probate court stated that:

> The remainder beneficiaries have also charged a possible conflict of interest between [the trustee] and the [Tyden company] due to the fact that
>
> (1) The [Tyden company] was a depositor of [the trustee]
>
> (2) The [Tyden company] had a line of credit with [the trustee] for up to $4 million . . . .
>
> (3) That [the trustee] was trustee of [Tyden company's] Pension and Profit Sharing Trust; and
>
> (4) [That [the trustee] was trustee and personal representative of the Tyden Company chief financial officer's inter vivos trust and will.]
>
> From testimony of various witnesses it was clear that [Tyden company] never borrowed from [the trustee], and that the Pension and Profit Sharing Trust had no [Tyden] stock and that investment responsibilities were taken away from [the trustee] in the mid 80's. The fact that [Tyden company] may have been a depositor of [the trustee] and that their chief financial officer may have used [the trustee] as his proposed trustee and personal representative do not in the Court's opinion create any conflict of interest.

The existence of banking relationships between the trustee and the Tyden company are not in dispute. The mere relationship does not itself establish a conflict of interest claim. Rather, the material question, as noted by this Court in *In re Estate of Frances Williams Messer Trust, dated January 10, 1939*, unpublished opinion per curiam of the Court of Appeals, issued May 29, 2001 (Docket No. 220177), slip op at p 4, was whether those relationships had any bearing on the treatment of trust. Here, the record reflects that no evidence was presented to indicate that the undisputed banking relationships had an affect on the trustee's administration of the trust.

Rather, the remainder beneficiaries have merely continued to maintain that the existence of the relationships alone is sufficient evidence of a conflict of interest. Therefore, summary disposition is proper.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Jessica R. Cooper